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IN THE

Supreme Court of the United States

October Term, 1964

No. 1065

NICHOLAS A. STIRONE,

Petitioner,

vs.

W. C. HURTT, Trustee in Bankruptcy of the Estate of William G. Rider, Individually and trading as Rider Supply Company and as Rider Construction Company, Bankrupt,

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Counter-Statement of the Case

Respondent, as trustee in bankruptcy of one William G. Rider ("Rider"), sued petitioner Nicholas A. Stirone ("Stirone"), a labor leader, to recover back $31,274.13 extorted by petitioner from the bankrupt. Stirone was convicted of this very act of extortion twice in jury trials under the Hobbs Anti-Racketeering Act, 18 U. S. C. § 1951. *United States v. Stirone,* 168 F. Supp. 490 (W. D. Pa. 1957), *aff'd* 262 F. 2d 571 (3rd Cir. 1958), *rev'd* [on error in the trial judge's charge on what constituted interstate

commerce], 361 U. S. 212 (1960); and *United States v. Stirone*, 311 F. 2d 277 (3rd Cir. 1962), *cert. den.* 372 U. S. 935 (1963).

The bankrupt, in whose behalf respondent brought this civil action, was the principal government witness in the criminal proceedings. Rider testified in those proceedings, as he did here, that Stirone, a very powerful labor leader in the Western area of Pennsylvania, threatened him with the loss of a contract to supply ready-mixed concrete unless he paid $.50 per cubic yard extortion. Rider testified that he did so because he was aware of Stirone's power as a labor leader and knew that Stirone could enforce his threat by causing labor difficulty. *United States v. Stirone*, 168 F. Supp. 490 at 497, 311 F. 2d 277 at 279. At the time of the threat, and during the period of time the extortion moneys were paid, Stirone was the president of two labor councils which negotiated for the principal labor unions in 33 counties of Western Pennsylvania with the principal heavy construction and large building contractors, including particularly Ragnar Benson, Inc., the company to which Rider was to supply concrete under his contract (Certified Record, pp. 19a-20a).

The defense in this civil action was the same as that offered in both criminal trials, that the petitioner was an influence peddler rather than an extortioner. Stirone claimed that he had been paid the $31,274.13 by the bankrupt as a "commission" for the use by him of his influence in helping the bankrupt obtain a contract with Ragnar Benson, Inc. *United States v. Stirone*, 168 F. Supp. 490 at 495; 311 F. 2d 277 at 279. There was no dispute that Stirone had received the $31,274.13. In fact, in this civil action he pleaded a counterclaim alleging that the bankrupt still owed him $1,503.75 under the claimed "commission" agreement (Certified Record, pp. 12a-14a).

The certified record of petitioner's indictment and conviction of extortion of the $31,274.13 from the bankrupt of the trustee-plaintiff in *United States of America v. Nicholas A. Stirone*, Criminal No. 14871, United States District Court for the Western District of Pennsylvania, was accepted by the trial court as conclusive proof of the fact of extortion. On this basis the trial court directed the verdict for respondent (Certified Record, pp. 257a-260a).

The court *en banc* affirmed the direction of the verdict for respondent and petitioner appealed to the Supreme Court of Pennsylvania (Appeal at No. 219 March Term, 1964). The Supreme Court, after argument, affirmed, 416 Pa. 493, 206 A. 2d 624 (1965). Petitioner then filed a Petition for Reargument (Certified Record, pp. 303-306) which was refused. This Petition followed.

ARGUMENT

I. The federal constitutional questions were not raised seasonably.

A federal constitutional question raised for the first time in a Petition for Reargument before the highest state appellate court is untimely.

American Surety Company v. Baldwin, 287 U. S. 156 (1932);

Radio Station WOW, Inc. v. Johnson, 326 U. S. 120, 128 (1945).

In the *American Surety Company* case this Court dismissed a Petition for Certiorari premised on a constitutional ground raised for the first time in a Petition for Reargument in a state court and said through Mr. Justice Brandeis at 287 U. S. 163-164,

> "The Surety Company petitioned for a rehearing. In that petition, besides reiterating several of its previous contentions, it urged, for the first time, that the rendition of the judgment on its undertaking violated the due process clause of the Fourteenth Amendment. The petition was denied without opinion. The federal claim there made cannot serve as the basis for review by this Court."

The Petition for Certiorari here, pages 6 and 7, clearly demonstrates that the constitutional questions (the applicability of Seventh and Fourteenth Amendments to the Constitution of the United States) were not raised until petitioner's Petition for Reargument in the Supreme Court of Pennsylvania (Certified Record, pp. 303-306). True, the question of the admissibility of the indictment and record of conviction were raised as stated on page 6 of the Petition for Certiorari but a reading of the Certified Record at the pages set out by petitioner, or any other pages thereof, clearly demonstrate that no constitutional questions were raised at the trial or in the Motion for New Trial. The Statement of Questions Involved in petitioner's Appeal Brief filed with the Supreme Court of Pennsylvania at No. 219 March Term, 1964 makes no reference to any federal or state constitutional questions. There is no mention in the brief otherwise of any constitutional issues, and the only reference to the state or federal constitutions is a passing one at page 16 where the following appears,

> "This [referring to the quantity of evidence offered in a criminal trial], of course, stems from the aforesaid basic and well established rights, many of which are provided by the Constitutions of the United States and the Commonwealth of Pennsylvania."

Therefore, petitioner is fairly bound by the rule that certiorari will be denied where it is premised on a constitutional ground raised for the first time in a Petition for Reargument before the highest state appellate court.

Further, this Court has held that it is without power to decide whether constitutional rights have been violated when the federal questions are not seasonably raised in accordance with state law.

Edelman v. California, 344 U. S. 357 (1953);
Pennsylvania Railroad Co. v. Illinois Brick Co., 297 U. S. 447 (1936).

The federal constitutional questions were not seasonably raised under Pennsylvania law. *In Re Dorrance's Estate*, 172 Atl. 900 (1933) [Not reported in official state reports]. In this case the Pennsylvania Supreme Court refused to grant a Petition for Reargument because the federal question of due process under the Fourteenth Amendment was raised for the first time in the Petition.

Rule 59 of the Rules of the Supreme Court of Pennsylvania, "Statement of Questions Involved", reads as follows:

> "The statement of the questions involved must set forth each question separately, in the briefest and most general terms, without names, dates, amounts or particulars of any kind, and whenever possible, each question must be followed immediately by an answer stating simply whether it was affirmed, negatived, qualified or not answered by the court below. If a qualified answer was given to the question, appellant shall indicate, most briefly, the nature of the qualification; or if the question was not answered and the record shows the reason for such failure, the reason shall be stated briefly in each instance without quoting the court below. The questions and answers in their entirety should not ordinarily exceed twenty lines, must never exceed one page, and must always be printed in type at least as large as point 11, on the first page of the Brief, without any other matter appearing thereon. *This rule is to be considered in the highest degree mandatory, admitting of no exception; ordinarily no point will be considered which is not thus set forth in or*

necessarily suggested by the statement of questions involved." (Emphasis added.)

Petitioner's Statement of Questions Involved in his brief before the Supreme Court of Pennsylvania does not raise the constitutional questions which are here raised and were raised for the first time in his Petition for Reargument in the Supreme Court of Pennsylvania. The Supreme Court of Pennsylvania has consistently held it will not consider arguments on questions not presented in the Statement of Questions Involved, and it did not consider any in this case, as is apparent from the opinions filed (Petition for Writ of Certiorari, pp. 16-28).

Kuhns v. Brugger, 390 Pa. 331, 354, 135 A. 2d 395, 408 (1957);

Kerr v. O'Donovan, 389 Pa. 614, 134 A. 2d 213 (1957).

The Supreme Court of Pennsylvania also holds that a question not raised properly in the court below will not be considered by it on appeal even though the question sought to be raised involves a constitutional issue, a doctrine which applies in the instant case.

Wynnewood Civic Association v. Lower Merion Township Board of Adjustment, 406 Pa. 413, 179 A. 2d 649 (1962);

Rome Township Referendum Recount Case, 397 Pa. 331, 155 A. 2d 361 (1959).

Petitioner did not raise the *constitutional questions* in the argument of this case before the Supreme Court of Pennsylvania, nor did he raise the *constitutional questions* in the trial court or in his Motion for New Trial (See: Petition for Certiorari, pp. 6-7, and references there to the Certified Record). Therefore, this Court is without the power to decide the constitutional questions because they were not seasonably raised in accordance with state law.

II. The decision in this case was based on an adequate non-federal ground.

It is hornbook law that the Supreme Court of the United States will not exercise jurisdiction for review of a federal constitutional question where the decision of the state court was based on an adequate non-federal ground. The decision of the Pennsylvania Supreme Court in this case is an application of a principle which is part of the law of *res judicata*. This Court has refused to exercise its jurisdiction where the law of *res judicata* constituted an adequate non-federal ground for the state decision.

Haley v. Breeze, 144 U. S. 130 (1892);
The Northern Pacific Railroad Company v. Ellis, 144 U. S. 458 (1892);
Postal Telegraph-Cable Company v. City of Newport, 247 U. S. 464 (1918).

III. The Seventh Amendment does not apply to civil jury trials in state courts.

The contention as to denial of a federal right to trial by jury by directing a verdict is unsound on its face. This Court has held that the Seventh Amendment does not apply to proceedings in state courts. *Minneapolis & St. Louis Railroad Company v. Bombolis*, 241 U. S. 211 (1916). Petitioner does not refer the Court to any case in which the Seventh Amendment has been construed as inhibiting the right of a state court judge to direct a verdict in a state civil action.

Indeed, this Court has held that the Seventh Amendment to the Constitution of the United States does not prevent a federal trial judge from directing a verdict. *Galloway v. United States*, 319 U. S. 372, 388-396 (1943). Further, the Pennsylvania Superior Court has held that Section 6

of Article I of the Constitution of the Commonwealth of Pennsylvania does not prohibit a trial judge from directing a verdict. *American Warming & Ventilating Company v. Fayette Lumber Company, Ltd.*, 57 Pa. Super. 608 (1914).

The Supreme Court of Pennsylvania heard the same arguments as are here presented by petitioner on the merits of the question whether the verdict should have been directed and was not persuaded. Petitioner may not ask this Court to re-examine those merits, except as they involve a "federal right"—and there is no federal right to a trial by jury in a state civil action.

IV. There was no denial of due process of law under the particular circumstances in treating the conviction of extortion as conclusive evidence of the fact of extortion.

In this lawsuit a convicted extortioner was sued by his victim's trustee in bankruptcy to recover the extorted money. At trial the record of conviction of this particular act of extortion was accepted by the trial judge as conclusive evidence of the fact of the extortion. Since there was no effort made to attack the conviction on the ground it had been obtained by fraud, perjury or was otherwise not legally proper, and since the receipt of the extorted sum was admitted, the trial judge directed a verdict for the plaintiff. The Supreme Court of Pennsylvania affirmed the trial judge's action.

Two contentions are advanced:

(1) that to permit this criminal to be bound by the conviction of extortion when his victim sues would somehow abridge his rights in the *criminal case* and (2) that because his conviction was theoretically subject to being upset by reason of *habeas corpus* proceedings, the conviction did not have a finality justifying its use.

The first contention is irrelevant, and upon analysis so speculative as to deserve rejection for that reason alone. Since the challenged ruling by the trial judge in this civil action did not take place until several years after the defendant had completed his defense in the second of two trials of the criminal proceeding under the Hobbs Act, that ruling obviously did not inhibit his actions in the criminal trial. Even if it had, the forum of complaint would be in the criminal proceedings where the "abridgement" of rights would in the theory of the petitioner take place. It is certainly no infirmity in the civil proceeding that a consequence of it *might* be to affect the defensive maneuvers in a criminal proceeding, where the criminal proceeding was already completed.

Furthermore, it is artful speculation to suggest that the criminal judgment was obtained because of a poor defense. This theory would justify equally rejection of the principle of *res judicata* because of the speculative possibility that the first decision might have been differently decided if one or both of the parties presented a different case—or the judge were different, or the jurors, or the weather. In the particular case of petitioner Stirone, he was represented at both criminal trials by the same lawyer who represented him in the trial of the civil action and his second conviction was affirmed by the Court of Appeals for the Third Circuit and certiorari was denied by this Court. The record in that criminal case contained testimony by the same witnesses as were called in the instant case, to the same effect.

The second contention is hardly more than a query—was the conviction improperly used because of the possibility that it might be upset in *habeas corpus* proceedings. Again the parallel with the doctrine of *res judicata* is pertinent.

A determination which has been affirmed by the highest court having jurisdiction over the matter under the applicable statutory or judicial authority in accordance with the pertinent procedural provisions thereof is final, even though thereafter efforts are made to obtain re-examination of the determination. *Helmig v. Rockwell Manufacturing Company*, 414 Pa. 518, 201 A. 2d 205 (1964). Until the efforts are successful the final adjudication stands, and its finality is not affected by the theoretical possibility that it may be set aside. So in the context before the trial court, the conviction of extortion by the petitioner of $31,248 from the bankrupt had been finally adjudicated. The theoretical possibility of the vacation of this adjudication neither entitled the petitioner to avoid going to jail for his crime, nor to avoid repayment of the extorted money.

The due process clause of the Fourteenth Amendment does not provide the right to re-litigate questions which have already been decided in a previous proceeding involving the same factual issues. *Baldwin v. Iowa State Traveling Men's Association*, 283 U. S. 522 (1931). In the instant case the decisive factual question in both the criminal and civil proceedings was the manner in which Stirone obtained the money. It is clear that all the Fourteenth Amendment demands is that full opportunity be presented in the previous proceeding to litigate the questions present in the subsequent action. *Sherrer v. Sherrer*, 334 U. S. 343 (1947).

CONCLUSION

The Petition for Certiorari should be denied.

Respectfully submitted,

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Certificate of Service

I certify that I have served this Brief upon opposing counsel, Lloyd F. Engle, Jr., Esquire, by mailing same to him postpaid at his office address, 1312 Frick Building, Pittsburgh, Pennsylvania 15219.

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